The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN SOTO PALMER, et al., Plaintiff, v. STEVEN HOBBS, et al., Defendants.	NO. 3:22-cv-05035-RSL DEFENDANTS JINKINS AND BILLIG'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION NOTE ON MOTION CALENDAR: MARCH 25, 2022

I. INTRODUCTION

This case touches on a core tenet of our democracy: equal representation. Under the United States and Washington Constitutions, the districts in which voters cast their ballots are redrawn every 10 years to ensure equal representation in government. Under the laws of the State of Washington, districts may not be drawn "purposely to favor or discriminate against any political party or group." Wash. Const. art. III, § 43(5); RCW § 44.05.090(2). And the Voting Rights Act of 1965 goes even further, prohibiting any practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . " 52 U.S.C. § 10301(a).

At issue in this case are troubling allegations that Legislative District 15, as redrawn, violates Section 2 of the Voting Rights Act by diluting the Latino vote in the Yakima Valley.

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Dkt. # 38 at p. 2. If these allegations are true, the situation is entirely unacceptable. The current structure of this case, however, will not lead to a full and fair adjudication on the merits. Plaintiffs have constructed a case with no real adversary. They did not sue the bipartisan Washington State Redistricting Commission (or even its members), which, according to Plaintiffs' own allegations, was the entity that analyzed the very issues raised in Plaintiffs' pleadings and is the entity tasked with redistricting under the Washington Constitution. Dkt. # 38 at p. 5; Wash. Const. art. II, § 43. Nor did Plaintiffs name the State of Washington itself, the entity now responsible for enforcing the redistricting maps. This unfortunate litigation strategy omits the very entities able to speak to the merits of Plaintiffs' claims.

Defendants Laurie Jinkins, the Speaker of the Washington State House of Representatives, and Andy Billig, the Majority Leader of the Washington State Senate, cannot speak on behalf of the Washington State Redistricting Commission or the State of Washington. Defendants Jinkins and Billig are not members of the Commission. They did not participate in the eleven months of work performed by the Commission that led to its redistricting plan. They did not scrutinize public comments, geographic boundaries, census data, and numerous map iterations and proposals. They did not participate in the debate and discussion that undoubtedly occurred throughout the Commission's drafting process. And as individual legislators, both from the same political party, they are but one vote each in their respective legislative bodies. Simply put, Defendants Jinkins and Billig are not proper defendants in this case and cannot (and are not empowered to) properly represent the bipartisan views underlying the Commission's redistricting work.[1]

In the absence of an appropriate party to meaningfully respond to the allegations underlying the Complaint, the Court should strictly hold Plaintiffs to their burden to establish their entitlement to relief under applicable legal standards. Should Plaintiffs prevail, the Court

[1] On February 23, 2022, Defendants Jinkins and Billig filed a Motion to Dismiss them from this case, which is presently pending before the Court. Dkt. # 37.

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can and should craft an appropriate remedy to ensure the redistricting maps of the State of Washington provide all Washingtonians with the representation to which they are entitled under the law. In so doing, the Court should heavily weigh timing and administrative considerations articulated by Secretary of State Steven Hobbs, the State official responsible for implementing the State's elections. All parties should be aligned to ensure that any redistricting map, whether the one adopted by the Commission or one ordered by the Court, "gets it right" under the law.[2]

Although Defendants Jinkins and Billig are unable to comment on the analysis and merits of the existing map, they offer the following briefing to assist with the Court's consideration of the legal issues raised in Plaintiffs' Motion, and in the crafting of a remedy, if appropriate.

II. FACTUAL BACKGROUND

A. Redistricting Commission Background

The voters of the State of Washington, through a voter-approved amendment to the Washington State Constitution, adopted a framework in which "a commission shall be established to provide for the redistricting of state legislative and congressional districts." Wash. Const. art. II, § 43(1). The Redistricting Commission is constitutionally required to "complete redistricting" by a date certain. Wash. Const. art. II, § 43(6); RCW 44.05.100(1). The Legislature may then amend the Redistricting Commission's plans by two-thirds vote in each house, but only in a way that impacts less than two percent of the population in any district and only within thirty days of convening the next legislative session. Wash. Const. art. II, § 43(7); RCW 44.05.100(2).

The Washington State Constitution established the Washington State Redistricting Commission as bipartisan by design. Wash. Const. art. II, § 43. The Commission must be composed of four voting members and a non-voting chair, with the leaders of each of the four legislative caucuses (House and Senate majorities and minorities) appointing the four voting

[2] Plaintiffs are correct in the general assertion that Washington State has experienced demographic shifts and population growth since the 2010 census. It would therefore be improper, in any event, to simply revert to the prior maps that are based on 2010 census data.

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members. Wash. Const., art. II, § 43(2); RCW 44.05.030(1). This means that the Speaker of the House (currently Defendant Jinkins, a Democrat), the House Minority Leader (a Republican who is not a party to this lawsuit), the Senate Majority Leader (currently Defendant Billig, also a Democrat), and the Senate Minority Leader (also a Republican who is not a party to this lawsuit) each appointed one voting member to the Commission. Those four Commissioners then jointly selected the fifth member, who acts as the non-voting chair. Wash. Const. art. II, § 43(2); RCW 44.05.030(3). All five members were appointed by the end of January 2021. Dkt. # 1 at p. 19, ¶¶ 110–12.

The Commission is tasked with preparing redistricting plans both for the state Legislature and for Washington's Congressional districts. Wash. Const., art. II, § 43(1). The Commission must use United States Census data to create districts that, among other things, contain contiguous territories, are compact and convenient, and are separated by natural geographic barriers, artificial barriers, or political subdivision boundaries. Wash Const. art. III, Sec. 43(5); RCW 44.05.090(2). Redistricting plans are to be completed no later than November 15 of each year ending in one. Wash. Const. art. II, § 43(6). When approved by at least three voting members, the Commission transmits the plans to the Legislature. RCW 44.05.100. If the Commission fails to achieve that deadline, then the Constitution directs the Washington Supreme Court to adopt a plan by April 30th of the year ending in two. Wash. Const. art. II, § 43(6); RCW 44.05.100(4).

On December 3, 2021, the Washington Supreme Court concluded that the Commission completed legislative and congressional redistricting plans by the constitutional deadline. *See Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court on November 16, 2021, and the Commission Chair's November 21, 2021, Declaration*, No. 25700-B-676 (Wash. Sup. Ct. December 3, 2021).[3] In support of that determination, the

[3] *Available at*: https://www.courts.wa.gov/opinions/pdf/Order%20Regarding%20Redistricting%20Commission%2025700-B-676.pdf. (last visited Mar. 21, 2022)

Commission's Chair, Sarah Augustine, submitted a sworn declaration describing some of the Commission's redistricting work (Augustine Decl.).[4] For example, Chair Augustine explained that the Commission held 17 public outreach meetings, 22 regular business meetings, received live testimony from 400 state residents, received more than 2,750 comments on draft maps or the 2010 redistricting maps, received more than 3,000 emails, website comments, letters, and voicemails, and consulted with Tribes. Augustine Decl., ¶ 4. Chair Augustine also explained that "[t]he public created 1,300 maps, of which 12 were formally submitted as third-party maps." *Id*. Chair Augustine also described the Commission's use of both licensed and publicly accessible redistricting software and tools. *Id*. at ¶ 7. In its Order, the Washington Supreme Court "accept[ed] the facts attested to by the chair of the Commission as accurate." Order at 3.

Following the Washington Supreme Court's Order, the Legislature, within the first thirty days of its 2022 regular session, enacted amendments to the Commission's plan. House Concurrent Resolution 4407 (2022) (HCR 4407).[5] These amendments occurred under the parameters of the Washington Constitution and Washington Revised Code, which permits the Legislature to amend the plan in only limited ways and only during a short timeframe. Specifically, amendments must pass by two-thirds supermajority vote, and only within the first thirty days of the next legislative session following the Commission's submission of the plan to the Legislature. Wash. Const. art. II, § 43(7). No amendment may include more than two percent of the population of any district. RCW 44.05.100(2). And, after the 30th day of the legislative session, "the plan, with any legislative amendments, constitutes the state districting law." Wash. Const., art. II, § 43(7). The plans take effect for the election in the year ending in two, and remain in effect until superseded by the next decennial redistricting.

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[4] *Available at:* https://www.courts.wa.gov/content/publicUpload/Redistricting/AugustineDecl%20Nov%2021%20signed.pdf. (last visited Mar. 21, 2022)

[5] The legislative history of HCR 4407, 67th Legislature, 2022 Regular Session *available at*: https://app.leg.wa.gov/billsummary?BillNumber=4407&Year=2021&Initiative=false. The text of HCR 4407, 67th Legislature, 2022 Regular Session, *available at*: https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/House%20Passed%20Legislature/4407.PL.pdf?q=20220217164036. (last visited Mar. 21, 2022)

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RCW 44.05.100(3). District boundaries cannot be changed or established except through the process set forth in article II, section 43, of the state Constitution, as described above. Wash. Const. art. II, § 43(11).

The law provides for the Commission to conclude its business and cease operations after submitting its plan to the Legislature. RCW 44.05.110. The Commission is to transmit its records to the Secretary of State, to act as custodian of those records. RCW 44.05.110(1). Unless reconvened or extended by the Washington Supreme Court, the Commission ceases to exist on July 1 of each year ending in two. RCW 44.05.110(2)

"If a commission has ceased to exist, the legislature may, upon an affirmative vote in each house of two-thirds of the members elected or appointed thereto, adopt legislation reconvening the commission for the purpose of modifying the redistricting plan." RCW 44.05.120(1). Any vacancies on the reconvened Commission are filled by appointment in the same manner as described above. The reconvened Commission then has no more than sixty days from the effective date of legislation reconvening it to modify the redistricting plans. RCW 44.05.120(4). The Legislature may amend a modified plan, subject to the same limits described above for the initial plan. That is, any amendment requires a two-thirds legislative supermajority, cannot affect more than two percent of the population of any district, and must occur within thirty days of convening the next legislative session. RCW 44.05.120(5). The modified plan becomes effective upon amendment by the Legislature or the expiration of the thirty days without amendment. RCW 44.05.120(6). The Commission then concludes its business and ceases to exist. RCW 44.05.120(7).

B. Procedural Background

Plaintiffs commenced this case to challenge the adopted legislative redistricting plan on January 19, 2022, six weeks after the Commission completed their redistricting plan. Dkt. # 1.

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Plaintiffs named only three defendants: Secretary of State Steven Hobbs,[6] Representative Laurie Jinkins (who serves as Speaker of the House), and Senator Andy Billig (who serves as Senate Majority Leader). Notably, the Complaint does not name the Legislature as a body, the minority counterparts in legislative leadership to Jinkins and Billig, the bipartisan Redistricting Commission, or the State of Washington.

Plaintiffs request declaratory and injunctive relief, arguing that Legislative District 15's "at best" bare Latino majority population fails to "provide Latino voters with an opportunity to elect a candidate of choice to the state legislature." Dkt. # 38 at pp. 11–12. They ask this Court to declare the Commission's legislative redistricting plan invalid under Section 2 of the Voting Rights Act, and that the plan was intentionally drawn to dilute Latino voting strength in the Yakima Valley. Dkt. # 1, Prayer for Relief, at p. 41, ¶¶ (a), (b). They further seek injunctive relief barring the use of the redistricting plan in conducting elections. *Id*. at ¶ (c). Finally, they ask the Court to order the implementation and use of a valid redistricting plan. *Id.*, ¶ (d). Plaintiffs ask for no relief specifically against Defendants Jinkins and Billig.

On February 23, 2022, Defendants Jinkins and Billig filed a Motion to Dismiss them from this case, which is presently pending before this Court. Dkt. # 37. Two days later, Plaintiffs filed the present motion. Dkt. # 38. Plaintiffs seek a preliminary injunction to "enjoin Defendants from using the Washington state legislative plan enacted in HCR 4407 ('Enacted Plan') and to require Defendants to adopt a state legislative plan that complies with Section 2 of the Voting Rights Act of 1965 ('VRA'), 53 [sic] U.S.C. § 10300." *Id*. at p. 1. Plaintiffs also filed their Opposition to Defendants Jinkins and Billig's Motion to Dismiss on March 14, 2022 (Dkt. # 44), and Defendants Jinkins and Billig filed their Reply on March 18, 2022 (Dkt. # 47).

On March 15, 2022, another plaintiff filed a separate lawsuit in the United States District Court for the Western District of Washington challenging the constitutionality of

[6] Defendant Hobbs answered the Complaint on February 16, 2022. Dkt. # 34. Defendant Hobbs thereafter submitted a Notice That Defendant Hobbs Takes No Position on February 25, 2022. Dkt. # 40.

Legislative District 15 "as an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *Garcia v. Hobbs*, No. 3:22-CV-5152-JRC, Dkt. # 1 at p. 1. In contrast to the allegations in the present case which assert that the district inadequately addresses the voting rights of Latinos, the complaint in this second lawsuit seemingly attacks the district as improper "[b]ecause race was the predominant motivating factor" in its creation. *Id*. at p. 3.

III. ARGUMENT

A. Legal Standards

1. Preliminary Injunction

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S. Ct. 1865 (1997) (emphasis in original) (per curiam) (citation omitted). An injunction may accordingly be granted only when the movant shows that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20, 129 S. Ct. 365 (2008); *see also Beardslee v. Woodford,* 395 F.3d 1064, 1067 (9th Cir. 2005). These elements may be balanced on a sliding scale, whereby a stronger showing of one element may offset a weaker showing of another. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1134–35 (9th Cir. 2011). However, the sliding-scale approach does not relieve the burden to satisfy all four prongs for a preliminary injunction to issue. *Id*. at 1135. When "a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo . . . courts should be extremely cautious about issuing a preliminary injunction." *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). Generally, "mandatory injunctions are not granted unless extreme or very serious damage will result and are not issued

in doubtful cases[.]" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (internal quotation and citation omitted).

Although Plaintiffs accurately cite the *Winter* factors in their Motion, the Ninth Circuit has also identified "considerations specific to election cases" for courts to "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction." *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 367–68 (9th Cir. 2016) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5 (2006)). In *Feldman*, the Ninth Circuit considered whether enjoining enforcement of a statute would "affect the state's election processes or machinery," whether the statute "newly criminalize[d] activity associated with voting," whether it would "disrupt long standing state procedures" and whether plaintiff had delayed in bringing the action. *Feldman*, 843 F.3d at 369. The court gave "careful and thorough consideration" to the election-specific issues, and only after this analysis, granted injunctive relief. *Id*. at 370.

In addition, the Court must give weight to the facts presented, but not any "unsupported and conclusory statements." *Herb Reed Enterprises, LLC v. Florida Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013).

2. Vote dilution claims under Section 2

Because no claim or allegation is directed at either Speaker Jinkins or Senator Billig, neither Defendant is in a position to support or oppose the merits of Plaintiffs' vote dilution claim. Nonetheless, any analysis of Plaintiffs' claims should include a thorough consideration of the allegations in Plaintiffs' Motion under the applicable law.

Section 2 of the Voting Rights Act of 1965 prohibits any voting standard, practice or procedure that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . " 52 U.S.C. § 10301(a). To establish a violation of the Voting Rights Act, the Court must evaluate, based on the totality of the circumstances, whether "the political processes . . . are not equally open to participation by members of a class of [protected] citizens . . . in that its members have less opportunity than other members of the

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electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Relevant to Plaintiffs' claims, the Voting Rights Act prohibits "vote dilution,"[7] which requires a minority group establish three elements: 1) that it is sufficiently large and geographically compact to constitute a majority in the district; 2) that it is politically cohesive; and 3) that "the white majority votes sufficiently as a bloc to enable it–in the absence of special circumstances"–to defeat the minority's preferred candidate.[8] *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S. Ct. 2752 (1986). If the Plaintiffs satisfy these three elements, the Court must then shift to a totality of the circumstances analysis. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1387–88 (E.D. Wash. 2014). There are seven factors, called the Senate Factors, which are relevant to the totality of the circumstances review:

> (1) The history of voting-related discrimination in the jurisdiction;
> (2) The extent to which voting in the elections of the jurisdiction is racially polarized;
> (3) The extent to which the jurisdiction has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
> (4) The exclusion of members of the minority group from candidate slating processes;
> (5) The extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
> (6) The use of overt or subtle racial appeals in political campaigns; and
> (7) The extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 1388. Because the Court is evaluating the totality of the circumstances, the Court may consider other relevant factors as well. *Id*. No one factor is controlling. *Id*. Rather, "[t]he ultimate

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[7] Manipulation of districts to fragment or pack minority voters can constitute vote dilution. *Johnson v. De Grandy*, 512 U.S. 997, 1006, 114 S. Ct. 2647 (1994). "Section 2 prohibits either sort of line-drawing where its result, 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Id*. (internal citations omitted).

[8] Importantly, "ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *De Grandy*, 512 U.S. at 1011–12 (discussing how *Gingles* factors may have variable legal significance depending on other facts). A vote dilution claim "'requires an intensely local appraisal of the design and impact of the contested electoral mechanisms.'" *Old Person*, 312 F.3d at 1039 (9th Cir. 2002) (quoting *Gingles*, 478 U.S. at 79).

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inquiry is whether, under the totality of the circumstances, the challenged electoral process 'is equally open to minority voters.'" *Id.* (quoting *Gingles*, 478 U.S. at 79).

a. Totality of the circumstances-the Senate Factors

The first Senate Factor, history of voting-related discrimination in the jurisdiction, must be analyzed within the context of whether, in the totality of circumstances, it "portended any dilutive effect from a newly proposed districting scheme, whose pertinent features were majority-minority districts in substantial proportion to the minority's share of voting age population." *De Grandy*, 512 U.S. at 1013. The Court cautioned that defining dilution as "a failure to maximize in the face of bloc voting (plus some other incidents of societal bias to be expected where bloc voting occurs) causes its own dangers, and they are not to be courted."[9] *Id*. at 1016. Notably, however, the Voting Rights Act is intended, in part, to *correct* an active history of discrimination. *Old Person v. Brown*, 312 F.3d 1036, 1051 n.16 (citing S. Rep. 97–417, at 5 (1982)).

The second Senate Factor is the extent of racially polarized voting in the jurisdiction's elections. This concept "encompasses the second and third *Gingles* preconditions–whether the minority group votes cohesively and whether the majority votes sufficiently as a bloc to usually defeat the minority's preferred candidate." *Montes*, 40 F. Supp. 3d at 1410. In making this determination, courts have considered the frequency in which a minority candidate was defeated as a result of bloc voting, as evidenced by low levels of "crossover" voting among non-minority voters. *Id*. "Election results from within the challenged voting system are most probative, although results from 'exogenous' elections may also be considered." *Id*. at 1402 (citing *U.S. v Blaine County*, *Montana,* 363 F.3d 897, 912 (9th Cir. 2004)); *see also Luna v. City of Kern*, 291 F. Supp. 3d 1088, 1120 (E.D. Cal. 2018).

[9] *See, e.g., Thomas v. Bryant*, 938 F.3d 134, 167–69 (5th Cir. 2019) (Higginson, J., concurring), *vacated as moot*, 961 F.3d 800 (5th Cir. 2020) (analysis of Section 2 cases involving a protected class comprising a numerical majority in their districts).

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The third Senate Factor, the extent to which the jurisdiction has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group is presumably styled as Senate Factor 4 in Plaintiffs' brief. Dkt. # 38 at p. 14 (describing odd-numbering of district as a practice that enhances discrimination). Courts have evaluated whether movement of voters from an even-numbered district to an odd-numbered district can constitute evidence of vote dilution. In doing so, courts assess such movement based on the specific facts at issue. For example, in *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012), the court stated that each case "should be assessed on its own record, and factors like the number of people moved, the overall population shifts in the state (both internally and from out-of-state), the impact on particular demographic groups, and comparable points, will all enter into the assessment."[10]

The fourth Senate Factor is the exclusion of minorities from the slating process, and asks "whether the members of the minority group have been denied access" to a candidate slating process. *Gingles,* 478 U.S. at 37. This factor is not discussed in Plaintiffs' Motion, nor does a candidate slating process appear to be relevant to the present dispute.

The fifth Senate Factor is "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles,* 478 U.S. at 37. Under this fifth factor, "plaintiffs must demonstrate both depressed political participation and socioeconomic inequality, but need not prove any causal nexus between the two." *Luna*, 291 F. Supp. 3d at 1137 (E.D. Cal. 2018) (citing *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 750 (5th Cir. 1993)). The Ninth Circuit has previously found this factor satisfied with a showing that minorities "suffered in education and employment opportunities, with disparate poverty rates, depressed wages, higher

[10] In *Thomas v. Bryant*, 366 F. Supp. 3d 786, 807 (N.D. Miss. 2019), *vacated as moot*, 961 F.3d 800 (5th Cir. 2020), the court concluded that lower minority voter turn-out in odd-year elections was applicable to Senate Factor 5 (socio-economic disparities) rather than Senate Factor 3 (unusual practices).

levels of unemployment, lower educational attainment, less access to transportation, residential transiency, and poorer health." *Feldman*, 843 F.3d at 406.

The sixth Senate Factor examines "whether political campaigns have been characterized by overt or subtle racial appeals." *Gingles,* 478 U.S. at 37. Often, plaintiffs satisfy this factor by pointing to racially charged campaign issues "that prey[ ] on racial anxiety," such as campaign literature that "appealed to the fears of Town residents that black students . . . would be bused to schools in the Town." *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1078 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018). Discussion of race alone is not sufficient to satisfy this factor; courts instead look to evidence that candidates attempt to sway votes with race-based appeals. *Montes,* 40 F. Supp. 3d at 1413 ("Having reviewed the record, the Court is not persuaded that political campaigns in Yakima have been characterized by racial 'appeals' to the voting base. While race was admittedly discussed in the media in connection with the 2009 City Council race between Ms. Rodriguez and Mr. Ettl, there is insufficient evidence that either candidate attempted to sway voters with race-based appeals.").

The seventh Senate Factor looks to "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles,* 478 U.S. at 37. *Gingles* directs courts to closely scrutinize the "design and impact of the *contested* electoral mechanisms." *Id*. at 79 (emphasis added). Courts give weight to elections that cover the particular office at issue, not necessarily hyperlocal or "exogenous" offices. *See Sanchez v. State of Colorado,* 97 F.3d 1303, 1324–25 (10th Cir. 1996) (explaining that with regard to the seventh Senate Factor, "exogenous elections—those not involving the particular office at issue—are less probative than elections involving the specific office that is the subject of the litigation") (quotation and citation omitted).

Courts may also consider two additional factors: (1) the extent to which elected officials have been responsive to the particularized needs of the minority group ("Senate Factor 8"); and

(2) the tenuousness of the policy underlying the challenged voting practice or procedures ("Senate Factor 9"). Senate Factor 8 examines whether there is "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group." *Gingles*, 478 U.S. at 45. Plaintiffs do not address this factor, nor do they make argument about any "particularized need" to which elected officials should be responsive. Senate Factor 9 considers whether the policies underlying the alleged action are "tenuous." *See Gingles*, 478 U.S. at 45. Plaintiffs also make no argument on this factor, or any suggestion that the policies underlying the drawing of district maps is "tenuous."

Defendants Jinkins and Billig respectfully submit that any analysis of Plaintiffs' claim proceed under these well-accepted legal standards.

B. Defendants Jinkins and Billig Are Not Proper Parties and Should Not Be Enjoined

As set forth in their Motion to Dismiss (Dkt. # 37), Defendants Jinkins and Billig are not proper parties to this litigation. Plaintiffs do not appear to allege, for instance, that Defendants Jinkins or Billig were engaged in any conduct that violates Section 2 of the VRA. Nor would such a claim make any logical sense. Defendants Jinkins and Billig are not Commission members and did not participate in the eleven months of work performed by the Commission that led to its redistricting plan. Nor were they involved in the drawing of Legislative District 15, or in the debate and discussion that led to its drawing. Defendants Jinkins and Billings have a tenuous relation to Plaintiffs' claims, at best.

Moreover, because Plaintiffs have filed no proposed order with their Motion, it is unclear what portion of the relief sought by this Court would (or even could) involve a directive to either Defendant Jinkins or Defendant Billig. On its face, Plaintiffs' Motion appears to demand the Court direct the three named Defendants to redraw the entirety of Washington's legislative maps. Dkt. # 38 at pp. 3, 24. But Defendants have no authority to do so.

As set forth in Section II.A, *supra*, the Washington Constitution and Revised Code strictly constrain the Legislature's role in redistricting. In Washington, the Legislature does not

have constitutional authority to draw legislative districts. Wash. Const. art II, § 43. The Legislature can only make minor amendments to a redistricting plan, involving less than two percent of the population in a district, and then only with the vote of a two-thirds supermajority of both houses that occurs within thirty days after the plan's submission from the Redistricting Commission. *Id*.; RCW 44.05.120(5). Because the timeframe for Legislative amendment, however modest those amendments may be, has passed, the Legislature is proscribed from changing the plans. At this point, any modification to the plan must be accomplished by the Redistricting Commission, which is convened until July of 2022. RCW 44.05.120(1). Given that the Legislature as a body is prohibited from amending the plan, it logically follows that Defendants Jinkins and Billig, as individual legislators, are undoubtedly prohibited from doing so.

Plaintiffs' requested relief also raises significant separation of powers concerns. In general, '[p]rinciples of federalism counsel against' awarding 'affirmative injunctive and declaratory relief' that would require state officials to repeal an existing law and enact a new law proposed by plaintiffs." *M.S. v. Brown*, 902 F.3d 1076, 1089 (9th Cir. 2018). The Ninth Circuit specifically cautions against federal courts demanding state legislatures take specific legislative action:

> Federal Courts do have jurisdiction and power to pass upon the constitutionality of Acts of Congress, but we are not aware of any decision extending this power in Federal Courts to order Congress to enact legislation. To do so would constitute encroachment upon the functions of a legislative body and would violate the time-honored principle of separation of powers of the three great departments of our Government. *This principle is equally applicable to the power of a Federal Judge to order a state legislative body to enact legislation*. The enactment of legislation is not a ministerial function subject to control by mandamus, prohibition or the injunctive powers of a court.

M.S., 902 F.3d at 1087 (emphasis added); *see also Reeves v. Nago*, 535 F. Supp. 3d 943, 956 (D. Haw. 2021) (federal court does not have power to order state officials to repeal voting-related laws and "enact new laws/rules or amend the foregoing to grant Plaintiffs (and those similarly situated) absentee voting rights"); *Arizonans for Fair Elections v. Hobbs*, 454 F. Supp. 3d 910,

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931 (D. Ariz. 2020), *appeal dismissed*, 20–15719, 2020 WL 4073195 (9th Cir. May 19, 2020) (denying request for injunctive relief to change initiative process due in part to difficulty of amending law; "[a] consistent theme in this order is that Plaintiffs' request raises significant federalism and separation-of-powers concerns."). This case magnifies the danger of judicial intrusion into legislative affairs (which are inherently bipartisan), particularly in the context of the bipartisan redistricting process, where Plaintiffs have named as defendants members of only one political party. Wash. Const. art. II, § 43 (Commission requires equal membership from both parties). Should the Court find injunctive relief is warranted, it certainly should not be directed solely at only two legislators of the same political party.

Accordingly, because no basis for liability or claim is alleged against Defendants Jinkins and Billig, and because neither individually has any power to effectuate the relief Plaintiffs seek, neither is the proper target of any injunctive relief from this Court.[11]

C. The Court Must Consider Washington's Election Timeline to Properly Balance the Equities

Should the Court conclude Plaintiffs are likely to succeed on the merits, the Court must balance the equities to consider the practicalities of the broad relief Plaintiffs seek on the timeframe seemingly contemplated by their Motion. "[D]istrict courts must give serious consideration to the balance of equities." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (citation omitted). In doing so, courts must consider "all of the competing interests at stake." *Id*. at 475. Indeed, the Supreme Court "has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30–31 (2020) (collecting cases). In *Purcell v. Gonzalez*, the Supreme Court vacated an appellate injunction of Arizona's voter identification rules, recognizing that

[11] Defendants Jinkins and Billig take no position as to the propriety of an injunction entered against another party. Rather, should the Court determine a remedy is appropriate, Defendants Jinkins and Billig restate their position that the Court should weigh heavily any considerations articulated by Defendant Hobbs, the State official responsible for implementing elections, regarding timing and administrative factors.

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"[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5.

The Supreme Court in *Merrill* applied the principle "that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and . . . that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. at 1; *see also Yazzie v. Hobbs*, 977 F.3d 964, 968–69 (9th Cir. 2020) ("Although we do not discourage challenges to voting laws that may be discriminatory or otherwise invalid, whenever they may arise, we are mindful that the Supreme Court 'has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.'") (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)).

When considering whether to grant preliminary injunctive relief, courts must consider the requested injunction's impact on the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). When a proposed injunction is narrow and limited to the parties, the public interest will be "at most a neutral factor in the analysis." *Id.* at 1139. "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* Such is the case here with Plaintiffs' requested relief, which extends far beyond the powers and auspices of the Secretary of State's Office and the two legislative defendants. Key parties are not before this Court and are not able to speak to the practical or legal viability of Plaintiffs' requested relief.

Likewise, in the vote dilution and redistricting context, "courts in this circuit have found that the public interest is generally served by allowing scheduled elections to move forward without delay rather than enjoining an election." *Sanchez v. Cegavske*, 214 F. Supp. 3d 961,

976–77 (D. Nev. 2016) (citing *Cano v. Davis*, 191 F. Supp. 2d 1135, 1139 (C.D. Cal. 2001)). Additionally, states may suffer "an irreparable injury whenever an enactment of its people or their representatives is enjoined," which is a particularly prescient consideration during an election cycle. *Hobbs,* 454 F. Supp. 3d at 930 (citing *Coal. For Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)).

To that end, there are very real and serious challenges at play in implementing a potentially brand new set of maps for this year's election. For instance, it appears from the text of Plaintiffs' Motion that their requested relief is not limited to Legislative District 15, but rather is targeted at enjoining the use of *all* new legislative districts. *See, e.g.,* Dkt. # 38 at p. 24 ("Plaintiffs respectfully request that this Court grant their motion, and . . . preliminarily enjoin Defendants' use of the *Enacted Plan*") (emphasis added).[12] But even if Plaintiffs' allegations are correct, discarding the legislative maps in their entirety will likely not be an equitable or proper outcome. For one, Plaintiffs do not have standing to challenge districts beyond their own. The Supreme Court has explained that claims alleging a plaintiff's vote has been diluted due to the "cracking" or "packing" of their district must be evaluated on a district-specific basis. *Gill v. Whitford,* 138 S. Ct. 1916, 1930 (2018).[13] Such plaintiffs "cannot sue to invalidate the whole

[12] Unfortunately, Plaintiffs did not provide the Court or Defendants with any proposed order setting forth with any specificity what form their proposed injunctive relief would take. This puts Defendants Jinkins and Billig in the unenviable position of extrapolating Plaintiffs' apparent desired relief, and the consequences therefrom, from one sentence contained at the end of their brief.

[13] Although *Giles* was a racial gerrymandering case premised on the Equal Protection Clause, the same standing analysis still applies to Plaintiffs' Section 2 claim, which asserts similar vote dilution arguments as the plaintiffs in *Giles*. *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1107 (S.D. Ohio 2003) (Graham, J., concurring), *aff'd*, 540 U.S. 1013 (2003) (noting that same standing rules applicable to Fourteenth Amendment election cases should apply to claims under Section 2 of Voting Rights Act "which was enacted to enforce the guarantees of the Fourteenth and Fifteenth Amendments"). Accordingly, many other courts, including those in this Circuit, have similarly required Section 2 plaintiffs to reside in the district where they allege harms. *See, e.g., Alpha Phi Alpha Fraternity Inc. v. Raffensperger,* 1:21-CV-5337-SCJ, 2022 WL 633312, at *10 (N.D. Ga. Feb. 28, 2022) ("Satisfying the *Gingles* preconditions and the Senate Factors proves the injury of vote dilution. Such harms must, however, be evaluated on a district-by-district basis."); *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 4:21-CV-01239-LPR, 2022 WL 496908, at *8 (E.D. Ark. Feb. 17, 2022) ("Supreme Court precedent is clear that redistricting lawsuits must proceed district-by-district. Accordingly, to have constitutional standing to bring a vote-dilution claim, an individual plaintiff (or in this case, a member of the Plaintiff-organizations) must live in a district that is allegedly "packed" or "cracked.""); *Old Person v. Brown*, 182 F. Supp. 2d 1002, 1006

State's legislative districting map; such complaints must proceed 'district-by-district.'" *Id.* at 1930 (quoting *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 135 S. Ct. 1257, 1265 (2015)).

Nor would it be appropriate or lawful to simply revert to Washington's previous legislative maps for the upcoming election. As Plaintiffs' own frequently-recited census figures show, the population of Washington has grown, shifted, and diversified significantly over the past decade. Accordingly, reverting to prior maps which were drawn using stale census data risks violating, for example, the Equal Protection Clause's guarantee of one-person, one-vote. *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, 1385 (1964) ("[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis"). Any equitable remedy ordered by this Court "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill,* 138 S. Ct. at 1921 (quotation and citations omitted). Indeed, as Secretary Hobbs will undoubtedly explain, to properly effectuate any relief granted, the Court should weigh heavily the practical implications of any modifications to the current legislative map.

IV. CONCLUSION

This Court can and should carefully consider Plaintiffs' claims, and if they are meritorious, should craft an appropriate remedy to ensure that all Washingtonians receive equal representation in Washington's redistricting plan. However, Defendants Jinkins and Billig have no ability to provide Plaintiffs with the relief they request and therefore respectfully request that, if Plaintiffs' claims are meritorious, any order instead be directed to parties who are legally able to implement any relief. Defendants Jinkins and Billig also respectfully request that the Court weigh heavily any administrative and timing considerations set forth by Secretary of State Hobbs to ensure that any modifications to Washington's elections can be fully and fairly implemented.

(D. Mont. 2002), *aff'd,* 312 F.3d 1036 (9th Cir. 2002 (holding that plaintiffs had "standing to assert their vote dilution claims in the . . . [d]istricts in which they reside.").

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of March 2022, at Seattle, Washington.

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